UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JOHN BOUCHER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 04-84-P-C***
	)	
NORTHEASTERN LOG HOMES, INC., et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANT CONTINENTAL PRODUCTS CO.'S MOTION TO EXCLUDE AND RECOMMENDED DECISION ON ITS MOTION FOR SUMMARY JUDGMENT

In this diversity-jurisdiction case stemming from the appearance of alleged latent defects in plaintiff John Boucher's New Hampshire log home, defendant Continental Products Co. ("Continental") moves for summary judgment with respect to Boucher's causes of action against it for negligence and breach of the implied warranties of merchantability and fitness for a particular purpose. *See* Amended Complaint and Jury Demand ("Complaint"), attached to Notice of Removal[1] (Docket No. 1), ¶¶ 16-18, 25-27; Continental Products Co.'s Motion for Summary Judgment ("Defendant's S/J Motion") (Docket No. 50) at 1-2.[2] Relatedly, Continental seeks to bar Boucher's expert Valerie Sherbondy from testifying at trial and to

[1] The action was originally filed in state court in Massachusetts and from there removed to the United States District Court for the District of Massachusetts. It was transferred to this court by order dated April 22, 2004.

[2] Continental also seeks summary judgment with respect to "all cross claims or third party claims[.]" Defendant's S/J Motion at 1. Subsequent to the filing of the instant motion, all claims against or by co-defendant Northeastern Log Homes, Inc. ("Northeastern") were dismissed with prejudice (including its cross-claim against Continental and Continental's cross-claim against it). *See* Stipulation of Dismissal With Prejudice of Defendant/Third-Party Plaintiff Northeastern Log Homes, Inc. Only (Docket No. 53). Still in play, however, are Continental's third-party complaint against Scott Bond d/b/a Scott Natural Finishes, *see* Defendant Continental Products Co.'s Third-Party Complaint Against Scott Bond d/b/a Scott Natural Finishes and Demand for Jury Trial (Docket No. 21), and Bond's counterclaim

(*continued on next page*)

exclude from use either at trial or in connection with the instant summary-judgment motion certain opinions contained in an affidavit of Sherbondy. *See* Continental Products Co.'s Motion To Exclude the Expert Testimony of Plaintiff's Expert Witness Valerie Sherbondy ("First Motion To Exclude") (Docket No. 52); Continental Products Co.'s Motion To Exclude Opinions by Expert Witness Valerie Sherbondy Contained in Her Affidavit Supplied in Response to Plaintiff's Motion for Summary Judgment ("Second Motion To Exclude") (Docket No. 67). For the reasons that follow, I grant the Second Motion To Exclude and recommend that the court grant Continental's motion for summary judgment as against Boucher. Inasmuch as adoption of this recommended decision would moot Bond's and Continental's claims against each other as well as the First Motion To Exclude, I do not address the merits of those cross-claims or the first exclusion motion.

I. Summary Judgment Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

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against Continental, *see* Third-Party Counterclaim (Docket No. 37).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Local Rule 56

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id*. The nonmoving party must then submit a responsive "separate, short, and concise" statement of material facts in which it must "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]" Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id*. The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id*. The movant then must respond to the nonmoving party's statement of additional

facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id*.

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(e). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment" and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id*.; *see also, e.g.*, *Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted." (citations and internal punctuation omitted).

II. Factual Context

A. Second Motion To Exclude

Continental moves to exclude, both for purposes of trial and for use in opposition to the instant motion for summary judgment, newly minted opinions of plaintiff's expert Sherbondy to the effect that Continental manufactured defective products or was negligent or that any such defects or negligence caused Boucher's damages. *See* Second Motion To Exclude at 1. Continental argues, and I concur, that Sherbondy's new testimony should be stricken for much the same reasons as this court struck belatedly proffered expert testimony in *Garrett v. Tandy Corp.*, 215 F.R.D. 15 (D. Me. 2003).

Here, as in *Tandy*, a plaintiff has blindsided a defendant late in a litigation with previously undisclosed expert opinions that materially alter the complexion of the plaintiff's case. *See Tandy*, 215 F.R.D. at 20. Here, as in *Tandy*, the plaintiff fails to offer a sufficiently compelling excuse for his tardiness to offset the palpable prejudice to the defendant. *See id*.

Federal Rule of Civil Procedure 26(a) provides, in relevant part:

> **(2) Disclosure of Expert Testimony.**
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> **(A)** In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
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> **(B)** Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor . . . .
>
> **(C)** These disclosures shall be made at the times and in the sequence directed by the court. . . . The parties shall supplement these disclosures when required under subdivision (e)(1).

In turn, Rule 26(e) provides, in relevant part:

> **(e) Supplementation of Disclosures and Responses.** A party who has made a disclosure under subdivision (a) . . . is under a duty to supplement or correct the disclosure . . . to include information thereafter acquired if ordered by the court or in the following circumstances:
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> **(1)** A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or

> other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.[3]

Fed. R. Civ. P. 26(e).

This case was transferred to this district from the District of Massachusetts on April 29, 2004. *See* Docket No. 1. Per this court's scheduling order as amended, Boucher was to designate experts, and provide a complete statement of all opinions to be offered and the bases and reasons therefor, by August 6, 2004.[4] *See* Docket Nos. 6, 30, 43 & 49. Discovery was to close on November 30, 2004, with dispositive motions due on December 23, 2004. *See id*.

Boucher provided an August 4, 2004 report of Sherbondy that drew no conclusions as to the existence of defects in Continental's products or the cause of various imperfections complained of by Boucher, including microcracking. *See* Second Motion To Exclude at 2. On August 19, 2004 Continental had its only opportunity subsequent to initiation of the instant litigation to visit Boucher's residence. *See id*. At that time, Sherbondy had no opinion as to what imperfections its products might have caused. *See id*. On October 14, 2004 Continental deposed Sherbondy. *See id*. She did not testify that the products were defective or that she had reached any conclusions as to what had caused imperfections in the finish of Boucher's home. *See id*. In November 2004, after having deposed Sherbondy and two other witnesses, Continental sought to revisit the Boucher home. *See id*. at 2-3. Boucher opposed the request, and the court denied it. *See* Report of Hearing and Order re: Discovery Dispute (Docket No. 46). On November

[3] Per Rule 26(a)(3), evidence to be presented at trial (other than solely for impeachment) must be disclosed at least thirty days before trial unless otherwise directed by the court. *See* Fed. R. Civ. P. 26(a)(3).

[4] The scheduling order also states, as an effective modification of the requirements of Federal Rule of Civil Procedure 26(a)(2)(B), that all required expert witness designation information may, but need not, be provided in the form of a written report prepared and signed by the expert.

29 and 30, 2004 Boucher deposed Michael McArthur, Robert Anthony, Richard Horn and Continental's expert. *See* Second Motion To Exclude at 3.

On December 17, 2004 Continental filed the instant motion for summary judgment. *See id*.; Docket No. 50. Boucher had not supplemented Sherbondy's designation. *See* Second Motion To Exclude at 3. On January 17, 2005, in opposition to Continental's summary-judgment motion, Boucher filed an affidavit of Sherbondy expressing, for the first time, opinions that the products were defective. *See generally* Affidavit of Valerie Sherbondy ("Sherbondy Aff."), Attachment No. 18 to Plaintiff John Boucher's Statement of Undisputed Material Facts in Connection With His Opposition to the Motion for Summary Judgment of Defendant Continental Products Co. ("Plaintiff's Additional SMF") (Docket No. 60).[5]

The defendant in *Tandy* invoked Federal Rules of Civil Procedure 16(f) and 37(b)(2) in seeking to exclude late-propounded expert opinions. *See Tandy*, 215 F.R.D. at 19. Rule 16(f) provides, in relevant part: "If a party or party's attorney fails to obey a scheduling or pretrial order, . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D)." Rule 37(b)(2) provides, in relevant part: "If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make

[5] Continental asserts that Boucher fails to controvert these background facts. *See* Continental Products Co.'s Reply Memorandum of Law in Support of Its Motion To Exclude Opinions by Expert Witness Valerie Sherbondy Contained in Her Affidavit Supplied in Response to Defendant's Motion for Summary Judgment ("Second Exclude Reply") (Docket No. 74) at 1. This is by and large true. *See generally* Memorandum of Plaintiff John Boucher in Opposition to Motion of Defendant Continental Products Co. To Exclude Expert Witness Opinions Contained in Affidavit of Valerie Sherbondy and Supplied in Response to Continental's Motion for Summary Judgment ("Second Exclude Opposition") (Docket No. 75). However, I note that Boucher does dispute Continental's characterization of Sherbondy as having offered, in her affidavit, an opinion that yellowing and cracking of the coatings revealed a manufacturing defect. *See id*. at 6. Accordingly, for purposes of adjudication of this motion, I omit any reference to Sherbondy as having offered such an opinion. Boucher does acknowledge, however, that Sherbondy opined in her affidavit that the product was defective. *See id*. Boucher also argues that the opinions set forth in Sherbondy's affidavit are either consistent with those (*continued on next page*)

such orders in regard to the failure as are just, and among others the following: . . . (B) An order . . . prohibiting that party from introducing designated matters in evidence[.]"

As the First Circuit recently has reemphasized in the context of disclosure of information regarding expert witnesses:

> Since an important object of [the Federal Rules of Civil Procedure] is to avoid trial by ambush, the district court typically sets temporal parameters for the production of such information. Such a timetable promotes fairness both in the discovery process and at trial. When a party fails to comply with this timetable, the district court has the authority to impose a condign sanction (including the authority to preclude late-disclosed expert testimony).

Macaulay v. Anas, 321 F.3d 45, 50 (1st Cir. 2003) (citations and internal quotation marks omitted). In *Macaulay*, the plaintiff's expert interjected a new theory of medical negligence into the case after discovery had closed and when trial was imminent. *See id*. at 51-52. The First Circuit observed: "Common sense suggests that when a party makes a last-minute change that adds a new theory of liability, the opposing side is likely to suffer undue prejudice." *Id*. at 52. Continental contends – persuasively – that it would suffer prejudice of like kind were Sherbondy's revised opinions to be permitted:

> Throughout the course of all of the substantive events in this case, the site visit, the Defendant's own expert designation, the depositions, the Defendant had the understanding that Valerie Sherbondy did not have any opinion that the product had a specific defect or that a defect in the product was the cause of Mr. Boucher's Complaint. Defendant's decisions with respect to its own expert testimony, the work that was done on the site visit, the follow up questions that could have been asked at Ms. Sherbondy's deposition, and the questions that were asked at the witness's depositions were all affected by that assumption, which was only confirmed at Sherbondy's deposition. It is absolute prejudice to the Defendant to sustain the expense of a deposition of an expert only to have her opinion change in such a fundamental and material fashion.

Second Motion To Exclude at 5.

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contained in her August 4, 2004 report or could have been elicited with sufficiently detailed questioning at her deposition. *See id*. at 5. I address that argument below.

Boucher seeks to justify the proffer of Sherbondy's significantly revised opinions on several grounds that reflect (on the part of his counsel) a troubling inattention to, or misunderstanding of, applicable practice and caselaw, including *Macaulay* and *Tandy*:[6]

1. That the prejudice Continental alleges it has suffered is the result of its own strategic decisions, *e.g.*, its omission to seek to place the deadline for disclosure of expert reports at a point in time subsequent to the deadline for completion of depositions, its decision to take Sherbondy's deposition early in the discovery process and its failure to probe Sherbondy sufficiently at deposition (for example, after she testified that certain problems could by caused by either the product itself or other factors, it did not ask her about factors that might influence her to conclude that one cause of the microcracking was more likely than others). *See* Second Exclude Opposition at 2-7.

As Continental suggests, *see* Second Exclude Reply at 2, this line of argument overlooks the fundamental fact that – per this court's scheduling order – Boucher had an affirmative obligation to have supplied Sherbondy's opinions and the bases and reasons therefor by August 6, 2004. That deadline was neither arbitrary nor insignificant – it was part of a purposeful structuring of the parties' obligations designed to avoid precisely the sort of surprise that occurred in this case. To the extent that circumstances do not permit a plaintiff to have obtained and fleshed out an expert's opinion prior to the initiation of suit, this court's scheduling orders typically afford the plaintiff a period of yet several more weeks to prepare for and

[6] What is more, the plaintiff's counsel ran afoul of the Local Rules of this court in several respects, failing to affix his electronic signature to filings made on behalf of his client, as required by Local Rule 5(c) and paragraph h(1) of the court's Administrative Procedures Governing the Filing and Service by Electronic Means, and neglecting to obtain the signature of local counsel on his filings, as required by Local Rule 83.1(c)(1). The purpose of this latter rule is to ensure that, at every important step along the way in a litigation, visiting lawyers have the benefit of the insight and experience of local practitioners, avoiding the sort of blunders caused by unfamiliarity with local caselaw, practice and rules that are evident in this case.

make an expert designation. The defendant then has several weeks to make its expert designation. Again, this is no accident: Standardized language in this court's scheduling orders presupposes that before having to do so, the defendant will have the benefit of a "complete statement of all opinions to be expressed" by the plaintiff's expert, and the bases and reasons therefor, as well as an opportunity to depose any experts designated by the plaintiff.

As Continental argues, *see id*., if Boucher believed his expert needed more information to reach her opinions, he should have initiated that discovery prior to the expert deadline. While, as Boucher posits, *see* Second Exclude Opposition at 4, he had a "right" to take depositions late in the discovery period, in so doing he took a risk that his expert might only then formulate material opinions and that neither his opponent nor the court would consider that tardiness excusable.

2. That the opinions set forth by Sherbondy in her affidavit were either consistent with her report of August 4, 2004 or could have been elicited with sufficiently detailed questioning at her deposition. *See id.* at 5. The specific examples Boucher provides of consistencies do not concern the critical opinions (that Continental's products were defective, that it was negligent or that its products caused the problems of which Boucher complains). *See id*. at 5-6 Nor is it clear how Continental could have elicited those critical opinions as of October 14, 2004 when (as Boucher himself states) Sherbondy became aware of certain facts underpinning them only through deposition testimony obtained subsequent to that date. *See* Memorandum of Plaintiff John Boucher in Opposition to Motion of Defendant Continental Products Co. for Summary Judgment ("Plaintiff's S/J Opposition") (Docket No. 59) at 17.

3. That Sherbondy had a right to qualify her opinions and wait and see what might be established through discovery; the fact that she might alter those opinions should have been clear to Continental based on deposition testimony such as the following: "Q. With respect to any of these samples,

have you tied the changes, the variances in color, to anything about the manufacture or design of the product? A. Not at this point." *See* Second Exclude Opposition at 8-10; Plaintiff's S/J Opposition at 17-18. Boucher elaborates:

> Instead of rendering an opinion based on facts which had yet to be established through discovery, Sherbondy chose to qualify her opinion. That is her right as an expert. Rule 703 of the Federal Rules of Evidence provides that experts may rely on facts from, among other sources, "information learned at the hearing or trial." This rule suggests, then, that the factual foundation affecting an expert's opinion can be developed as late as at trial. . . . Where facts are established subsequent to the report or the deposition, the expert is entitled to take a pass on speculation and instead embrace facts adduced subsequent to the report and deposition as dispositive of the expert's conclusions.

Plaintiff's S/J Opposition at 17-18. However, as Continental points out, *see* Second Motion To Exclude at 5, this again begs the question whether Boucher could have taken steps to ensure earlier discovery of those factual predicates. Boucher chose to schedule the depositions in question on the eve of the close of discovery. As Continental notes: "He was free to schedule any necessary depositions to develop his expert's opinion prior to the [expert-designation] deadline, or at least prior to his expert's deposition." *Id*. What is more, the First Circuit has rejected the very position taken by Boucher: holding, in essence, that the language of Rule 703 does not trump the disclosure requirements of Rule 26. *See Sheek v. Asia Badger, Inc*., 235 F.3d 687, 694 (1st Cir. 2000) ("It seems clear that Rule 703, which outlines the permissible bases for expert testimony, was not designed to thwart the goals of open and fair discovery embraced by Rule 26. . . . There is . . . ample support in the record for the district court's conclusion that Asia Badger stood in violation of Rule 26(e)(1), and we do not believe that Rule 703 was intended to end-run this basic requirement of fair play.").

For all of the foregoing reasons, I grant Continental's motion to exclude, for purposes of both summary judgment and trial, any opinions by Sherbondy that (i) there are defects in the manufacture or

design of its products, (ii) such a defect caused Boucher's damages, (iii) Continental was negligent, (iv) any negligence by Continental caused Boucher's damages, (v) any defect in the products caused microcracking, or (vi) any defect in the products caused staining, whitening or streaking.

B. Relevant Facts

With the foregoing resolved, the parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to Boucher as nonmovant, reveal the following relevant to this recommended decision:[7]

In 1999 Boucher, of Weymouth, Massachusetts, purchased a log-home kit from Northeastern of Kenduskeag, Maine, to build a house in Wakefield, New Hampshire. Continental Products Co.'s Statement of Material Facts in Support of Its Motion for Summary Judgment ("Defendant's SMF") (Docket No. 51) ¶ 1; Plaintiff's Response to Statement of Facts of Defendant Continental Products Co. ("Plaintiff's Opposing SMF") (Docket No. 62) ¶ 1. Construction began in the fall of 1999. *Id*. ¶ 2.

Boucher hired Scott Bond to apply the interior finishes. *Id*. ¶ 3. Specifically, Boucher hired Bond to apply finish to the interior walls of the first and second floors of his log home and to the exterior walls. Plaintiff's Additional SMF ¶ 121; Affidavit of John Boucher ("Boucher Aff."), Attachment No. 17 to Plaintiff's Additional SMF, ¶ 1. He did not engage Bond to perform any finish work in the cellar of his home. *Id*. Rather, because the wood for the interior of the cellar was installed later than that for the first

[7] Continental moves to strike paragraphs 110 through 120 of the Plaintiff's Additional SMF on the bases, *inter alia*, that they contain the opinions that are the subject of its Second Motion To Exclude. *See* Defendant Continental Products Co.'s Response to Plaintiff's Statement of "Undisputed Material Facts" Offered With His Opposition to Defendant's Motion for Summary Judgment ("Defendant's Reply SMF/Additional") (Docket No. 71) at 22. I grant that motion, on that basis, with respect to those portions of paragraphs 113-16, 118 and 120(a) that contain the offending opinions. I disregard the remaining statements on the basis that, in the absence of any cognizable opinion regarding product failure, they no longer are particularly useful or relevant. *See* Plaintiff's Additional SMF ¶¶ 110-20.

and second floors, he chose to do the finish work in the basement himself. *Id*.[8] Bond's business, in Winslow, Maine, consists largely of stripping and staining log and post-and-beam homes. Plaintiff's Additional SMF ¶ 43; Defendant's Reply SMF/Additional ¶ 43. Nearly all of the approximately 200 homes to which Bond has applied finish have been in New England. *Id*. ¶ 44.

Bond applied the finish to the Boucher home in November 2000. Defendant's SMF ¶ 4; Plaintiff's Opposing SMF ¶ 4. He applied two Continental products, a product called QuikSand that was to be used as an interior primer or sanding sealer, and a product known as PolySeal that was used as a topcoat. *Id*. ¶5.[9] A sanding sealer is designed to be put onto a wood substrate. Plaintiff's Additional SMF ¶ 6; Defendant's Reply SMF/Additional ¶ 6. It is a water-based coating. *Id*. Continental started manufacturing QuikSand in August or September 1999. *Id*. ¶ 4. Lab and production samples of the product were made in August of that year. *Id*. The first sales of QuikSand were made in April or May of 2000. *Id*. ¶ 93.

Northeastern was a distributor of Continental's line of coatings used on log homes. Defendant's SMF ¶ 6; Plaintiff's Opposing SMF ¶ 6. Bond had applied a substantial amount of Continental products to log homes, many of them Northeastern log homes. *Id*. ¶ 7. Continental often obtains feedback from applicators in connection with product testing. Plaintiff's Additional SMF ¶ 94; Defendant's Reply SMF/Additional ¶ 94. Over time, Bond had given Michael McArthur of Continental substantial feedback with respect to Continental's products. Defendant's SMF ¶ 8; Plaintiff's Opposing SMF ¶ 8.[10] McArthur has been head of the specialty-sales division of Continental since 1989. Plaintiff's Additional SMF ¶ 90;

[8] Continental purports to qualify paragraph 121 of the Plaintiff's Additional SMF; however, inasmuch as it fails to provide record citations in support thereof, its qualification is disregarded. *See* Defendant's Reply SMF/Additional ¶ 121.
[9] The parties have not consistently spelled the names of these products. I adopt the spellings contained in Continental's Product Data Sheet. *See* Attachment No. 14 to Plaintiff's Additional SMF.
[10] Boucher describes this as "an ongoing conversation for the better part of a year regarding product improvements[.]" Plaintiff's Additional SMF ¶ 60; Defendant's Reply SMF/Additional ¶ 60.

Defendant's Reply SMF/Additional ¶ 90. Specialty sales involve sales of coating to, among others, the log-home industry. *Id*. McArthur obtains feedback for products in the development stage from persons in the log-home industry. *Id*. ¶ 91. Products are refined and improved in the same manner. *Id*. Prior to this case, Continental has never taken issue with the manner in which Bond applied Continental finish to a log home. *Id*. ¶ 92.

In a conversation, McArthur asked Bond if he would try the sanding sealer, which was a new product. Defendant's SMF ¶ 9; Plaintiff's Opposing SMF ¶ 9. There was no discussion of the Boucher home in particular. *Id*. ¶ 10. McArthur told Bond that Continental was developing a new product with additional tannin blockers that was a little softer and cost a little less than PolySeal. Plaintiff's Additional SMF ¶ 59; Defendant's Reply SMF/Additional ¶ 59.[11] Prior to this conversation, Bond had had no experience with any type of sanding sealer. *Id*. ¶ 61. McArthur and Bond discussed where the sanding sealer would be delivered. *Id*. ¶ 62. Continental has often sent finish materials for a Northeastern-supplied home directly to Bond at the site where he was to perform an application. *Id*. ¶ 25. On other occasions, Bond would pick up the finish at Northeastern's office in Kenduskeag, Maine. *Id*. Bond picked up the sanding sealer at the Northeastern warehouse. *Id*. ¶ 57.

Continental provided some quantities of QuikSand to Northeastern prior to its actually being put out on the market. *Id*. ¶ 96. McArthur identified Exhibit 1 as an invoice, with a shipping date of September 13, 1999, for five five-gallon containers of QuikSand shipped by Continental to Northeastern, which McArthur confirmed as being for "trial with Scott Bond." *Id*. ¶ 97. Richard Horn, who has been sales manager for Northeastern since 1979, identified as Exhibit 4 a no-charge invoice for QuikSand, which reflected

[11] Although Boucher states that he – Boucher – had this conversation with McArthur, *see* Plaintiff's Additional SMF (*continued on next page*)

Continental's making the product available to Bond to try out. *Id*. ¶¶ 24, 26. Northeastern also sold Bond buckets of the PolySeal. Defendant's SMF ¶ 12; Plaintiff's Opposing SMF ¶ 12. Bond selected the products to be used on the home. *Id*. ¶ 13.

At the time the five containers of QuikSand were shipped to Northeastern for trial by Bond, Continental had yet to develop consumer labels for the product, and thus the containers did not have those labels on them. Plaintiff's Additional SMF ¶ 98; Defendant's Reply SMF/Additional ¶ 98. McArthur knew the product shipped to Northeastern would end up in Bond's possession. *Id*. ¶ 99. McArthur does not recall instructing either Northeastern or Bond with respect to procedures for application of the five containers of QuikSand. Plaintiff's Additional SMF ¶ 100; Deposition of Michael P. McArthur ("McArthur Dep."), Attachment No. 11 to Plaintiff's Additional SMF, at 15. The product data sheet for QuikSand was used as a temporary label, or as a "precursor to the official label." Plaintiff's Additional SMF ¶ 102; Defendant's Reply SMF/Additional ¶ 102. McArthur acknowledged that this label does not have instructions for application of the product. *Id*.[12] Continental started putting consumer labels on buckets of QuikSand in spring 2000. *Id*. ¶ 108.

If any of the sanding sealer Bond had picked up had instructions on it, he would have read them. Plaintiff's Additional SMF ¶ 58; Defendant's Reply SMF/Additional ¶ 58. However, he does not recall

¶ 59, it is clear from the context that he meant to refer to Bond.

[12] In its statement of material facts, Continental asserts that Northeastern supplied Bond six (not five) five-gallon buckets of sanding sealer, one of which would have been commercially marked with a label with application instructions. *See* Defendant's SMF ¶ 11; Rule 30(b)(6) Deposition of Northeastern through its designee Richard A. Horn ("Northeastern Dep."), Attachment Nos. 8 & 22 to Plaintiff's Additional SMF, at 92-93; McArthur Dep. at 47. The citations given do not support the proposition that one of the six buckets was so labeled. In any event, Boucher disputes that any of the buckets was labeled with instructions, stating that Bond did not observe any such labels on the buckets, *see* Plaintiff's Opposing SMF ¶ 11; Deposition of Scott Bond ("Bond Dep."), Attachment No. 9 to Plaintiff's Additional SMF, at 38, 62, and I view the cognizable evidence in the light most favorable to Boucher as nonmovant.

seeing instructions on any of the buckets of sanding sealer. *Id*.[13] Prior to applying the product, Bond had received no recommendation from Continental as to how many coats of sanding sealer should be applied to the Boucher home. *Id*. 52.[14]

Bond applied two coats of the sanding sealer and one coat of the PolySeal in Boucher's house. Defendant's SMF ¶ 14; Plaintiff's Opposing SMF ¶ 14. He applied two coats of the sanding sealer because, "in order to generate a surface smooth enough for the topcoat to flatten out and have the sheen that we wanted to have, two coats must be applied." Plaintiff's Additional SMF ¶ 53; Defendant's Reply SMF/Additional ¶ 53.

Bond and his personnel would turn the heat in the Boucher home up to 75-80 degrees overnight to assist in curing of the finish. *Id*. ¶ 46. When they were working during the day, they sometimes turned the heat down to about 60 degrees to make it more comfortable. *Id*. They opened a window occasionally while they were at work, if only so they could work more comfortably. *Id*. ¶ 71. When they were done for the week, they would leave the heat between 65 and 70 degrees. *Id*. ¶ 46. Bond said the condition of the wood during sanding was "very, very surface dry." *Id*. ¶ 47. The wood inside the home did not feel damp or wet at the time the sanding sealer was applied. *Id*. ¶ 48. Bond and his crew would always close up the buckets of material at the end of the day and did the same thing at the end of the entire job. *Id*. ¶ 72. It was their custom and practice to make sure the seal between the top and the bucket was taut. *Id*.

At some point during application of the sanding sealer, Bond observed discoloration "like a spilled cup of coffee on a tablecloth . . . [a] brownish yellowish discoloration in at least one of the corners." *Id*. ¶

[13] Continental admits that this was Bond's testimony but disputes the substance of it. *See* Defendant's Reply SMF/Additional ¶ 58. Nonetheless, I view the cognizable evidence in the light most favorable to Boucher as nonmovant.
[14] Continental admits that this was Bond's testimony but disputes that he received no instructions. *See* Defendant's Reply SMF/Additional ¶ 52. I view the cognizable evidence in the light most favorable to Boucher.

49. Bond suspected that the discoloration was caused by a reaction between the sanding sealer and some sort of contaminant. *Id*. ¶ 50. To Bond's knowledge, there had never been any other Continental sanding sealers prior to the one he used on the Boucher home. *Id*. ¶ 51. Boucher and Bond attempted to shellac the discolored area and chose to keep on applying the coating. Defendant's SMF ¶ 15; Plaintiff's Opposing SMF ¶ 15.

Over time, Boucher claimed additional problems with the appearance of the interior surfaces of his log home, some of them appearing nine months to a year and a half after the application to the home. *Id*. ¶ 16. Boucher's problems included (i) areas in which the finish had turned white and flaked, (ii) areas in which the finish had turned white but had not yet flaked, (iii) areas that had darkened to a coffee-colored appearance, as opposed to the lighter natural-wood look that Boucher preferred, (iv) generalized darkening of the finish throughout the house, (v) stripes that appeared to be the result of failure of a wood preservative with which the wood was treated, (vi) dark corners of some of the interior log surfaces, and (vii) dark staining in areas where water had penetrated and washed off the stain. *Id*. ¶ 17. In addition, "microcracking" had been observed in samples from the house. *Id*. ¶ 18. Continental has had limited sales of the sanding sealer because of failure to find a market niche. *Id*. ¶ 21. Northeastern stopped selling QuikSand because "[w]e just didn't sell much of it." Plaintiff's Additional SMF ¶ 27; Defendant's Reply SMF/Additional ¶ 27.

Bond used the PolySeal regularly before using it on the Boucher home and was satisfied with it. Defendant's SMF ¶ 24; Plaintiff's Opposing SMF ¶ 24. On four or five occasions, a sporadic stain appeared overnight after the PolySeal was applied. *Id*. There is no evidence that such stains appeared in this case. *Id*. ¶ 25. Boucher did not observe any such marks soon after the paint set up. *Id*. In the course of trying to correct streaking from an air-infiltration problem at the knee wall, Bond visited the Boucher

home several times and observed firsthand other stains that began to appear several months after he completed his work. Plaintiff's Additional SMF ¶ 54; Defendant's Reply SMF/Additional ¶ 54. The stains became "larger and intense and more frequent" over time. *Id*. ¶ 55. Bond measured a number of logs at random at the Boucher home to determine how much they had shrunk over time. *Id*. ¶ 56. He concluded from his measurements that the logs had on average shrunk less than one percent since the time they had been milled. *Id*.

Bond described the beginnings of a corner stain in the master bedroom "some months" after he finished the project. Plaintiff's Additional SMF ¶ 65; Bond Dep. at 74-75. That stain grew over time. *Id*. Other white streaking, described by Bond as discoloration, showed up in the master bedroom. Plaintiff's Additional SMF ¶ 66; Defendant's Reply SMF/Additional ¶ 66. This problem became more "intense" over time. *Id*. In some cases, the discoloration took the form of stripes, and in other cases, it appeared as "unexplained color changes within a given log with no rhyme or reason." *Id*. This occurred a few months after Bond finished the project. *Id*.[15]

Bond testified that he was baffled by the non-uniform color of logs located in places where there never could have been a leak. *Id*. ¶ 67. He referred specifically to the bedroom above the kitchen, where there were no water streaks, and also pointed out the joists and posts that he said had a "frosty appearance." *Id*. Most recently, Bond has observed "almost an acceleration in the darkening of the so-called heartwood." *Id*. He described a dramatic increase in dark brown staining of the interior V-match in places that made no sense to him, where no rain had fallen. *Id*. Bond testified that, except for the initial

[15] Continental admits that paragraph 66 accurately reflects Bond's testimony; however, it qualifies the statement by asserting that the white vertical stripes that go from log to log in the master bedroom were not the results of product failure but rather the result of liquid running down the wall. *See* Defendant's Reply SMF/Additional ¶ 66; Deposition of Loren W. Hill, Ph.D. ("Hill Dep."), Attachment No. 10 to Plaintiff's Additional SMF, at 42.

white streaks caused by leaks, every other stain in the Boucher home had gotten darker (or in the case of the frosty posts, has gotten whiter) in the three years since he performed his work. *Id*. ¶ 68. Bond has noticed neither discoloration in the cellar of the Boucher home nor any of the other problems he observed on the first and second floors. *Id*. ¶ 75. There are windows in the basement. *Id*.

When Bond was at the house in late 1999, he saw nothing in the way the house was built or protected from the elements that was unusual or gave him cause for concern. *Id*. ¶ 69. At that time, not all of the framing had been finished. *Id*. He observed that the V-match was being stored in the basement of the home. *Id*. Bond never encountered any problem with the heating system at the home. *Id*. ¶ 70. On many occasions – about one-third of the time, according to Bond – pressure washing of the exterior of a house results in the infiltration of some water into the interior of the home. *Id*. ¶ 73. Bond does no thinning of the products he applies. *Id*. ¶ 74.

Had he been asked, Bond would have told Boucher that water-based polyurethanes are supposed to be nonyellowing. *Id*. ¶ 64. "In fact, I think they call the color on the Continental product crystal clear." *Id*. Bond testified that, outside those areas that were clearly the result of the contaminant, he did not have any opinion on the cause of the remaining problems with the coating. Defendant's SMF ¶ 30; Plaintiff's Opposing SMF ¶ 30.

Northeastern's expert, Paul Scheiner, testified that the causes of the finish problems were application when there was too much moisture in the wood and water penetration. Defendant's SMF ¶ 26; Deposition of Paul C. Scheiner, Ph.D. ("Scheiner Dep."), Exh. I to Defendant's SMF, at 15-16, 18-21, 28-29, 31, 35, 107-08.[16] Scheiner's chemical testing of the coating showed that "the product is fine."

[16] Boucher objects to Continental's use of Scheiner's testimony on the ground that Scheiner was retained as an expert by (*continued on next page*)

Defendant's SMF ¶ 27; Scheiner Dep. at 158.[17] Scheiner identifies his "client" as John Felice, counsel for Northeastern. Plaintiff's Additional SMF ¶ 125; Defendant's Reply SMF/Additional ¶ 125. Scheiner is not a licensed construction supervisor and never has built a house or been a carpenter. *Id*. ¶ 126.

Boucher's expert, chemist Valerie Sherbondy, stated that: (i) one dark area under a window was the result of water entry and not the result of a failure or defect in the Continental products, (ii) the darkening of other areas was the result of exposure of the wood to an acidic environment, the source of which was unknown to her, and (ii) the cause of some of the white "fogginess" identified by Boucher, described by Sherbondy as "opacity," was an excessively thin application, while other opacity was caused by exposure to moisture before the Continental product was fully dried, or "cured." Defendant's SMF ¶ 31; Deposition of Valerie D. Sherbondy ("Sherbondy Dep."), Exh. F to Defendant's SMF, at 37-38, 40-42.[18]

Sherbondy summarized her conclusions as to the cause of the discoloration of the surface as follows: "I think from the report it is apparent that some of the discoloration is not a problem with the product or products, but other ones still have not been answered directly. . . . They could be caused other than by the products but it could be by the product itself as well." Defendant's SMF ¶ 34; Plaintiff's Opposing SMF ¶ 34. She summarized her overall conclusions regarding the cause of the microcracking as follows:

Northeastern, which has now been dismissed from this case. *See* Plaintiff's Opposing SMF ¶ 26. However, as Continental points out, it designated Northeastern's experts in its own expert designation. *See* Defendant Continental's Reply to Plaintiff's Response to Continental's Statement of Facts ("Defendant's Reply SMF/Opposing") (Docket No. 70) ¶ 26; Defendant Continental's Designation With Respect to the Anticipated Expert Witness Testimony of Loren Hill, Robert Anthony, and Others, Attachment No. 1 thereto, at 3. Boucher cites no authority for the proposition that Continental may not use Scheiner's testimony in these circumstances, and I find none. Boucher's objection accordingly is overruled.

[17] Boucher's objection to this statement, *see* Plaintiff's Opposing SMF ¶ 27, is overruled for the reasons discussed in footnote 16, above.

[18] Boucher purports to dispute this entire statement; however, he effectively disputes only those portions in which Continental asserts that Sherbondy (i) could not attribute the acidic environment to a defect in the Continental products

(*continued on next page*)

Q. With respect to the microcracking, you identify five different causes. Correct? . . . .

A. Correct.

Q. And of those, two of them may be product problems. Correct?

A. Yes.

Q. And one of them could be a lack of plasticizer in the coating. Correct?

A. Correct.

Q. And I understand that you've never tested for that in this case?

A. Correct.

Q. So you can't say one way or the other whether there's a lack of plasticizer in the coating. Correct?

A. Correct.

Q. With respect to additives or incorrect thinners added to the coating, you did test for that. Correct?

A. I did.

Q. And you didn't find any improper additives?

A. Not at this point, no.

Id. ¶ 35. Sherbondy agreed that it is common in the industry for urethane products to darken over time. *Id.* ¶ 36. With respect to Boucher's allegations that the darkening was "splotchy" or uneven, she could neither identify a defect in the Continental product nor a cause of the splotchiness. Defendant's SMF ¶ 37;

and (ii) identified multiple areas (rather than one area) resulting from water entry. *See* Plaintiff's Opposing SMF ¶ 31; Sherbondy Dep. at 37-38. I have modified the statement to reflect Boucher's version of events.

Sherbondy Dep. at 85-88. She acknowledged that it could be the result of uneven application. Defendant's SMF ¶ 37; Sherbondy Dep. at 85-86.[19]

Robert Anthony has been employed by Continental as its technical manager for the last six years. Plaintiff's Additional SMF ¶ 1; Defendant's Reply SMF/Additional ¶ 1. In that position, he assists the production staff with the manufacture of new and existing coatings. *Id*. Anthony identified Exhibit 1 to his deposition as a document describing the QuikSand product that typically would be sent by Continental to an applicator. *Id*. ¶ 7. The document describes QuikSand as a "clear acrylic sanding sealer." *Id*. The QuikSand product does not have pigment in it. Plaintiff's Additional SMF ¶ 106; McArthur Dep. at 38-39. It is a transparent product that is not meant to be a stain. *Id*.[20]

Anthony visited the Boucher log home on August 19, 2004. Plaintiff's Additional SMF ¶ 8; Defendant's Reply SMF/Additional ¶ 8. During his visit Anthony observed the following: (i) some knots on interior walls (known as V-match boards) had "a whitish crust on them[,]" Plaintiff's Additional SMF ¶ 9(a); Deposition of Robert D. Anthony ("Anthony Dep./Plaintiff"), Attachment No. 1 to Plaintiff's Additional SMF, at 37-38,[21] (ii) areas inside the closet in the upper right-hand bedroom had "blue stain" and "brownish growth[,]" Plaintiff's Additional SMF ¶ 9(b); Defendant's Reply SMF/Additional ¶ 9(b),[22] and (iii) a spruce beam running across the ceiling had a "whitish layer" on it, *id*. ¶ 9(c).

[19] Boucher's response to this statement is not characterized as an admission, denial or qualification, as required by Local Rule 56. *See* Plaintiff's Opposing SMF ¶ 37. To the extent he means to suggest that Continental's statement is not supported by the citations provided, I disagree.

[20] Continental denies this statement, *see* Defendant's Reply SMF/Additional ¶ 106; however, I view the cognizable evidence in the light most favorable to Boucher.

[21] Continental disputes this statement in part, *see* Defendant's Reply SMF/Additional ¶ 9(a); however, I view the cognizable facts in the light most favorable to Boucher.

[22] Continental qualifies this statement, pointing out that the "blue stain" is a fungal growth. Defendant's Reply SMF/Additional ¶ 9(b); Deposition of Robert D. Anthony ("Anthony Dep./Defendant"), Exh. H & Attachment No. 12 to Defendant's SMF, at 100-01.

If QuikSand is applied too thickly, it is possible that "as it dries it may tend to develop internal stresses and develop some cracking[.]" Plaintiff's Additional SMF ¶ 10; Anthony Dep./Plaintiff at 41-42.[23] According to Anthony, application of the QuikSand "on the cold surface, in combination with the high humidity out in the building, prevented the water from leaving the film. . . . It's possible in areas that were cold enough that the sanding sealer would not have formed as tight a film as we would expect under ambient dry – under warmer drying conditions." Plaintiff's Additional SMF ¶ 11; Defendant's Reply SMF/Additional ¶ 11. The areas Anthony believed were "colder" were the exterior walls; that is, the log walls on the outside part of the house. *Id*.

Continental might make recommendations to applicators concerning proper ventilation of a home during application of QuikSand. *Id*. ¶ 12. According to Anthony, the problem with application of QuikSand by Bond would be the "cold outdoor temperatures that will keep the large mass of the log and the windows cold to allow the coalescence of the latex particles to be less than they should be." *Id*. ¶ 13. Anthony observed "severe cracking" on a sample of the windowsill from the home's kitchen. *Id*. ¶ 14.

After Michael McArthur's return from a meeting in October 2002, he asked Anthony to prepare samples of the PolySeal and QuikSand to send to KTA-Tator "as reference materials." *Id*. ¶ 15. These samples were delivered to KTA-Tator. *Id*. Anthony identified Exhibit 5 to his deposition as a "trip report" reflecting his visit to KTA-Tator's offices in Pittsburgh. Plaintiff's Additional SMF ¶ 16; Anthony Dep./Plaintiff at 67. The purpose of that visit was to "have Valerie Sherbondy show [Anthony] some of the things that she saw in her examination of samples that had been sent to her by Mr. Boucher." *Id*.[24]

[23] Continental qualifies this statement, asserting that Anthony specifically described a cracking other than the "microcracking" claimed by Boucher. Defendant's Reply SMF/Additional ¶ 10; Anthony Dep./Plaintiff at 42.

[24] As Continental points out, *see* Defendant's Reply SMF/Additional ¶ 16, Boucher misquotes the testimony. I have corrected those errors.

Anthony provided to Sherbondy several wood samples that had been coated with QuikSand and stored by him at various temperatures. Plaintiff's Additional SMF ¶ 17; Defendant's Reply SMF/Additional ¶ 17. Two samples were delivered personally by Anthony to Sherbondy, and four additional pieces were mailed to her. *Id*.

Anthony has never tested at Continental's offices any wood samples from the Boucher home. *Id*. ¶ 18. The opinions he has expressed "about the defects that were seen inside the Boucher house would not be affected" by the manner in which the logs or V-match were stored prior to construction. Plaintiff's Additional SMF ¶ 19; Anthony Dep./Plaintiff at 89.[25] Anthony, who has reviewed all of Sherbondy's reports, does not take issue with the methods she used to investigate the subject problems. Plaintiff's Additional SMF ¶ 20; Anthony Dep./Plaintiff at 93-94.[26] In some places, Anthony observed areas that were white that he believes were caused by an excessively thick application of the sanding sealer. Plaintiff's Additional SMF ¶ 21; Defendant's Reply SMF/Additional ¶ 21. Over-application of the sanding sealer will obscure some of the grain and cut down on the clarity of the varnish. *Id*. ¶ 22. The "whiteness" and "haziness" that Anthony observed is attributable to the fact that two coats of the sanding sealer were applied rather than one coat. Plaintiff's Additional SMF ¶ 23; Anthony Dep./Plaintiff at 109-10.[27]

Anthony authenticated as Exhibits 12 through 17 various Continental internal documents reflecting refinements of the QuikSand product based on its own testing or the complaints of customers. Plaintiff's Additional SMF ¶ 23A; Anthony Dep./Plaintiff at 114-24; Anthony Dep. Exhs. 12-17, Attachment Nos. 3-

[25] Continental denies this statement, *see* Defendant's Reply SMF/Additional ¶ 19; however, I view the evidence in the light most favorable to Boucher.
[26] Continental denies this statement, *see* Defendant's Reply SMF/Additional ¶ 20; however, I view the evidence in the light most favorable to Boucher.
[27] Continental qualifies this statement, asserting that Anthony testified these conditions also were caused by an under-application of the PolySeal. Defendant's Reply SMF/Additional ¶ 23; Anthony Dep./Plaintiff at 110.

7 & 21 to Plaintiff's Additional SMF.[28] In August 2001 Anthony investigated certain "coffee staining" that appeared on a Northeastern log home near Dayton, Ohio, that had been finished with PolySeal. Plaintiff's Additional SMF ¶ 23B; Defendant's Reply SMF/Additional ¶ 23B. Continental could not postulate a specific cause of the staining, but some Continental personnel believed it could have been caused by a reaction between the PolySeal and a number of different sources. *Id*.

McArthur, of Continental, first visited the Boucher home in October 2002. *Id*. ¶ 103. At that time he observed several containers of QuikSand, but only one container had a label on it with application instructions. *Id*. In addition to an area where he observed the remnants of an "ice dam," McArthur observed streaking on other walls. Plaintiff's Additional SMF ¶ 104; McArthur Dep. at 26.[29] McArthur identified as Exhibit 6 to his deposition certain marketing materials put out by Continental in or about 2000. Plaintiff's Additional SMF ¶ 109; Defendant's Reply SMF/Additional ¶ 109. The second page of Exhibit 6 contains a description of QuikSand as "the perfect clear wood primer." *Id*.

When Horn, of Northeastern, first visited the Boucher home on October 28, 2002, he observed white spots on the interior walls, or V-match. *Id*. ¶ 28. Horn stated that he believed the "ice dam" was caused by construction that deviated from the plans supplied by Northeastern to the contractor, Michael Wilkinson – although he confirmed that Northeastern failed to mention this alleged defect in workmanship in its answers to interrogatories. *Id*. ¶ 29. Horn also observed a whitening of the finish in the closets. *Id*. ¶

[28] Boucher further asserts that QuikSand was refined in part because of complaints about a stain blocker. *See* Plaintiff's Additional SMF ¶ 23A. However, as Continental points out, *see* Defendant's Reply SMF/Additional ¶ 23A, this assertion is not supported by the materials cited. It is on that basis disregarded.

[29] Continental qualifies this statement, noting that McArthur testified that there had been general acknowledgement that this streaking was caused by some liquid material, probably water. *See* Defendant's Reply SMF/Additional ¶ 104; McArthur Dep. at 26.

30. He disagreed with McArthur's recollection that Horn thought the problems were confined to small areas. *Id*. ¶ 31.[30]

None of the materials provided by Northeastern discusses the appropriate number of coats of sanding sealer to apply to the interior of a Northeastern log home. *Id*. ¶ 34. Nothing in Horn's investigation suggested that Boucher or Wilkinson did anything to expose the construction materials to moisture. Plaintiff's Additional SMF ¶ 35; Northeastern Dep. at 88.[31] The logs shipped by Northeastern to a home site are expected to shrink by less than one-quarter of an inch over time. Plaintiff's Additional SMF ¶ 36; Defendant's Reply SMF/Additional ¶ 36. Boucher took Horn to the basement of his home, where he showed him V-match that "had water-based urethane on it and that didn't show the coloration that it did upstairs." Plaintiff's Additional SMF ¶ 37; Northeastern Dep. at 101. Horn did not observe any streaking or discoloration on the interior walls of the basement, and none of the problems Horn observed on the first and second floors were observed by him in the basement. Plaintiff's Additional SMF ¶ 37; Northeastern Dep. at 109-10.[32]

Other than in this case, Northeastern has not encountered any issues with Bond's performance in finishing a log home. Plaintiff's Additional SMF ¶ 38; Defendant's Reply SMF/Additional ¶ 38. The V-match in the basement looked "[t]he same color as when it was first put up." *Id*. ¶ 39. Wood materials for

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[30] Boucher describes some of the content of a meeting attended by Horn, Jonathan French and others in Cleveland. *See* Plaintiff's Additional SMF ¶¶ 32-33, 107. I sustain Continental's objection to these statements on the ground that the comments in question took place during the course of a settlement discussion and therefore are inadmissible pursuant to Federal Rule of Evidence 408. *See* Defendant's Reply SMF/Additional ¶¶ 33, 107; Northeastern Dep. at 73; *Steinberg v. Obstetrics-Gynecological & Infertility Group, P.C*., 260 F. Supp.2d 492, 498 (D. Conn. 2003) ("Rule 408 bars offers of settlement and the admission of statements and conduct made in the course of compromise negotiations.") (citation and internal quotation marks omitted).

[31] Continental disputes this statement on the basis that it is not supported by the citation given, *see* Defendant's Reply SMF/Additional ¶ 35; however, I disagree.

[32] Continental qualifies this statement, asserting that while this was Horn's testimony, another deponent observed some of the same problems in the basement that were found upstairs. *See* Defendant's Reply SMF/Additional ¶ 37; Anthony (*continued on next page*)

the Boucher home were shipped from Northeastern to the home site on September 27, 1999. *Id.* ¶ 40. In Horn's estimation, the V-match was handled properly at the site. *Id.* ¶ 41.[33] At a meeting at the Boucher house on January 24, 2003, Horn stated that the interior of the home was "unacceptable." *Id.* ¶ 105.

Loren Hill is an expert witness on behalf of Continental. *Id.* ¶ 76. In connection with his work on this case, Hill was asked to inspect the coating, determine if it was performing in the intended manner and, if not, why not. *Id.* ¶ 77. Hill performed no testing of any materials in connection with his work. *Id.* ¶ 78. He assumed, for purposes of his analysis, that Bond's application of two coats of sanding sealer was at variance with Continental's specifications, which mandated only one coat of application. *Id.* ¶ 79. Hill noticed discoloration on the V-match, though he said it was "very little." *Id.* ¶ 80. Hill observed streaking in several rooms, including the exterior wall on both the porch and kitchen sides of the house and in some rooms upstairs. Plaintiff's Additional SMF ¶ 82; Hill Dep. at 42-43.[34] He did not see any determination of moisture content in the house. Plaintiff's Additional SMF ¶ 83; Defendant's Reply SMF/Additional ¶ 83. He observed that the window trim and window sills exhibited whitish type of discoloration. Plaintiff's Additional SMF ¶ 84; Hill Dep. at 47.[35]

Hill has no opinion as to whether any of the problems in the interior of the house are attributable to the failure to protect the logs or V-match from moisture prior to construction. Plaintiff's Additional SMF ¶ 86; Defendant's Reply SMF/Additional ¶ 86. He is not qualified to determine whether the flashing over the windows was not sufficiently protective of the house. *Id.* ¶ 87. He stated that the effect of the application

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Dep. /Plaintiff at 37-38.

[33] Boucher further asserts that the configuration of the heating system at the Boucher home was appropriate and cannot be blamed for the problems with the finish at the home. *See* Plaintiff's Additional SMF ¶ 42. However, the statement is not fully supported by the citation given and is on that basis disregarded.

[34] Continental qualifies this statement, *see* Defendant's Reply SMF/Additional ¶ 82, but its qualification is unintelligible and is on that basis disregarded.

of two coats of the sanding sealer is to make the wood more susceptible to microcracking. *Id.* ¶ 88. He agreed with Sherbondy that microcracking sometimes causes whitening. *Id.* ¶ 89.

Boucher applied a sealant called Minwax to the interior walls of the cellar. Plaintiff's Additional SMF ¶ 122; Boucher Aff. ¶ 2. To the best of his knowledge, Minwax is not manufactured by Continental. *Id.* The interior walls of the cellar were finished over time, beginning in the summer of 2000 and continuing into the fall of 2004. *Id.* As of August 19, 2004, the date of a site visit by Bond, Northeastern, Continental and their respective attorneys and experts, nearly all of the finish work in the cellar had been completed. *Id.*[36] None of the discoloration, whitening, frosting, coffee-like staining or streaking that appeared on the interior walls of the first and second floor had appeared on the interior walls of the cellar. Plaintiff's Additional SMF ¶ 123; Boucher Aff. ¶ 3.[37] Boucher had an opportunity to observe the containers of sanding sealer used by Bond and his crew in connection with finishing the interior walls of the first and second floors. Plaintiff's Additional SMF ¶ 124; Boucher Aff. ¶ 4. None of the buckets that Bond brought to the site contained a label of any kind or nature. *Id.*

III. Analysis

Two of the five counts of Boucher's amended complaint implicate Continental. *See generally* Complaint. Boucher alleges that Continental breached implied warranties of merchantability and fitness for a particular purpose (Count I) and "negligently and carelessly manufactured the finish that was applied to the materials used to construct [his] home" (Count IV). *See id.* ¶¶ 16-18, 25-27. As a threshold choice-of-law matter, the parties agree that the law of the state of New Hampshire applies. *See* Defendant's S/J

[35] My wording reflects Continental's qualification. *See* Defendant's Reply SMF/Additional ¶ 84.
[36] Continental purports to qualify paragraph 122 of the Plaintiff's Additional SMF; however, inasmuch as its qualification is unsupported by any record citation, it is disregarded. *See* Defendant's Reply SMF/Additional ¶ 122.
[37] Continental denies this statement, *see* Defendant's Reply SMF/Additional ¶ 123; however, I view the cognizable
(*continued on next page*)

Motion at 9-10; Plaintiff's S/J Opposition at 4. Continental seeks summary judgment with respect to all three causes of action. *See* Defendant's S/J Motion at 8-9. For the reasons that follow, I agree that summary judgment is appropriate with respect to all three claims.

A. Implied Warranty of Fitness for a Particular Purpose

New Hampshire's Uniform Commercial Code ("UCC") statute pertaining to the implied warranty of fitness for a particular purpose provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

N.H. Rev. Stat. Ann. § 382-A:2-315. "By its terms, RSA 382-A:2-315 (1961) applies only if, at the time of sale, a seller knows or has reason to know of the particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment." *Dalton v. Stanley Solar & Stove, Inc.*, 629 A.2d 794, 797 (N.H. 1993). In addition, the use to which the buyer intends to put the product must be "particular" rather than "ordinary." *See* N.H. Rev. Stat. Ann. § 382-A:2-315 cmt. 2 ("A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question."); *Ford Motor Co. v. General Accident Ins. Co.*, 779 A.2d 362, 375 (Md. 2001) (party asserting claim under section 2-315 of UCC must show, *inter alia*, a "particular purpose" that "must be distinguishable from the normal use of the goods; the purpose must be peculiar to the buyer as

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evidence in the light most favorable to Boucher.

distinguished from the ordinary or general use to which the goods would be put by the ordinary buyer.") (citations and internal punctuation omitted).

As Continental observes, Boucher adduces no evidence (i) that he had a "particular," as opposed to "ordinary," purpose for the goods in question or (ii) that Continental knew that those goods were intended for use in the Boucher home. *See* Defendant's S/J Motion at 14. Indeed, it is undisputed that when Bond agreed to try QuikSand, he and McArthur had no discussion regarding the Boucher home. Continental accordingly is entitled to summary judgment with respect to that portion of Count I alleging breach of the implied warranty of fitness for a particular purpose.

B. Implied Warranty of Merchantability

New Hampshire's UCC statute covering the implied warranty of merchantability provides, in relevant part, that "[g]oods to be merchantable must be at least such as . . . are fit for the ordinary purposes for which such goods are used[.]" N.H. Rev. Stat. Ann. § 382-A:2-314(2)(c). As Continental points out, *see* Defendant's S/J Motion at 10-11, in construing this statute in the context of a case against a beautician who had applied permanent-wave solution, following which the plaintiff's hair fell out, the Supreme Court of New Hampshire held:

> Whether proceeding under an implied warranty under the Uniform Commercial Code, or on a strict tort liability based on a defective product which is unreasonably dangerous, the plaintiff has the burden of proving that her injury resulted from the unmerchantability or unsuitableness of the product, in the former case, or from a defect therein, in the latter instance. It is not enough for the plaintiff to show that the permanent wave solution was applied and that she subsequently suffered injury. Plaintiff must adduce proof of facts and circumstances warranting the conclusion that the product was unwholesome or not fit for the purpose for which it was intended. The cornerstone rule in products liability is that proof of mere injury furnishes no rational basis for inferring that the product was defective for its intended use.

Elliott v. Lachance, 256 A.2d 153, 156 (N.H. 1969) (citations and internal quotation marks omitted).

Boucher argues strenuously that *Elliott* no longer is good law, per the weight of authority from other jurisdictions published in the thirty-five years since *Elliott* was decided. *See, e.g.*, Plaintiff's S/J Opposition at 3 ("Much like the way in which the 'citadel of privity' has toppled, the requirement that a plaintiff in an implied warranty case prove the actual cause of an 'unmerchantable' product has been abrogated across the board."). However, Continental, in its rejoinder, has the better of the argument. As Continental observes, *see* Continental Products Co.'s Reply Memorandum of Law in Support of Its Motion for Summary Judgment ("Defendant's S/J Reply") (Docket No. 69) at 5, the United States District Court for the District of New Hampshire recently cited *Elliott* for the very proposition that Boucher claims is outmoded, *see Willard v. Park Indus., Inc.*, 69 F. Supp.2d 268, 274 (D.N.H. 1999) (citing *Elliott* for proposition that, under New Hampshire law, a plaintiff "may not rely on the sole fact that an accident occurred to show a breach of warranty. Rather, he must provide the court with evidence that the product was unfit for its ordinary and intended use.") (citation omitted).

What is more, as Continental points out, *see* Defendant's S/J Reply at 5 n.2, the First Circuit's practice is to refrain from anticipating changes in state law, *see, e.g.*, *Bogosian v. Woloohojian*, 158 F.3d 1, 8 (1st Cir. 1998) ("Although our conclusion is not entirely free from doubt, we hold that Rhode Island law does not at present allow an award of compound interest in this situation (or most others), although it conceivably might do so in the future. This conclusion, which we reach as a matter of law, is consistent with our practice of not anticipating changes in state law in advance of the state courts."). I discern no reason why this court should not follow that practice in this case. Accordingly, *Elliott* applies, as a result of which Boucher must demonstrate that Continental's products were unfit for their intended use.

Continental next observes, and I again agree, that resolution of the question whether one or both of the Continental products was defective and, if so, whether any such defect(s) caused the harm of which

Boucher complains, requires expert testimony. *See* Defendant's S/J Motion at 12. As the Supreme Court of New Hampshire has explained the basic rule:

> Expert testimony is required . . . to aid the jury whenever the matter to be determined is so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman. In medical malpractice cases, for example, expert testimony is generally required to establish the proximate cause element. In particular, expert testimony is necessary to establish causation if any inference of the requisite causal link must depend upon observation and analysis outside the common experience of jurors. This serves to preclude the jury from engaging in idle speculation. Lay testimony suffices, however, only if the cause and effect are so immediate, direct and natural to common experience as to obviate any need for an expert . . . opinion.

Estate of Joshua T. v. State, 840 A.2d 768, 771-72 (N.H. 2003) (citations and internal punctuation omitted); *see also, e.g., Lemay v. Burnett*, 660 A.2d 1116, 1118 (N.H. 1995) (explaining concept as follows: "As one court stated in a crosswalk accident case: 'The layman, although he may cross the street regularly, does not possess the technical knowledge needed to judge the city's decision to install a crosswalk, instead of a stop sign, light, or crossing guard, at a particular intersection.'") (citation omitted).

As in the crosswalk example, houses, interior walls and even arguably wall coatings are part of jurors' everyday experience. However, just as a juror does not possess the technical knowledge to judge whether a crosswalk or some other methodology is preferable, a juror could not simply draw on ordinary experience to assess whether the problems of which Boucher complains were caused by defectively manufactured coatings as opposed to, say, excessive moisture in the logs or a defect in construction. Indeed, even the designated experts in this case do not agree on a particular cause. Expert testimony accordingly is required to establish that QuikSand and/or PolySeal was unfit for its intended use.

Building on its two prior arguments, Continental finally contends that there is a dearth of expert evidence establishing that its products were unmerchantable – a circumstance that entitles it to summary

judgment. *See* Defendant's S/J Motion at 12-14. As of the time it filed the instant motion, Continental accurately summarized the state of the record as follows:

> In this case, Boucher has no evidence to establish the cause of his problems with the coating. Both he and his painting contractor testified that it is beyond their ability to testify as to the cause of the defects, particularly the microcracking. Neither Northeastern's nor Continental's expert testified that the product was the cause of any defect. Even Boucher's expert could not testify that there was either a design or a manufacturing defect with the product. More important, she could not testify that any of the problems that Boucher was having with the product were caused by any one of a number of causes, including those that had nothing to do with the product.

Id. at 12-13. No doubt recognizing the weakness of his position, Boucher sought for the first time, in opposing summary judgment, to introduce new opinions by Sherbondy that Continental's products were in fact defective. *See* Plaintiff's S/J Opposition at 16-18; *see generally* Sherbondy Aff. I have granted Continental's motion to exclude those opinions. As Continental points out, *see* Defendant's S/J Reply at 4-5, in the absence of Sherbondy's belated opinions, the rest of the evidence relied upon by Boucher catalogues the existence of problems but fails to establish that Continental's products were to blame for them. Without the belated Sherbondy testimony, Boucher is in the same position as the *Elliott* plaintiff: adducing ample evidence of the existence of an injury but no evidence that the defendant's conduct or products actually caused that harm. Continental accordingly is entitled to summary judgment with respect to that portion of Count II of Boucher's complaint alleging breach of the implied warranty of merchantability.

C. Negligence

The survivability of Boucher's final claim against Continental – for negligence – again raises a question whether Boucher can switch course at the summary-judgment stage of the instant litigation.

However, as to this claim, the issue is not only whether he can adduce new evidence (in the form of Sherbondy's affidavit) but also whether he can assert a new theory of liability.

In Count IV of his amended complaint, Boucher alleged that "Continental negligently and carelessly manufactured the finish that was applied to the materials used to construct [his] home." Complaint ¶ 26. In its motion for summary judgment, Continental argued that Boucher had failed to adduce any evidence establishing the standard of care for a paint manufacturer, breach of that standard by Continental, or causation. *See* Defendant's S/J Motion at 14-15; *see also, e.g., Estate of Joshua T.*, 840 A.2d at 771 ("It is axiomatic that in order to prove actionable negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, breached that duty, and that the breach proximately caused the claimed injury."); *Lemay*, 660 A.2d at 1117 ("Where negligent conduct is alleged in a context which is within the realm of common knowledge and everyday experience, the plaintiff is not required to adduce expert testimony either to establish the applicable standard of care or to prove that the defendant failed to adhere to it. Expert testimony is required, however, where the subject presented is so distinctly related to some science, profession or occupation as to be beyond the ken of the average layperson.").

In response, Boucher contended, as an initial matter, that he had raised a triable issue whether Continental's failure to provide Bond with instructions for application of the sanding sealer proximately caused defects on the walls of the interior of the home. *See* Plaintiff's S/J Opposition at 9-12. Continental protested, *inter alia*, that the Complaint failed to assert any such theory. *See* Defendant's S/J Reply at 6. I agree. *See* Complaint ¶¶ 25-27.

This court has taken a dim view of the assertion of an unpleaded legal theory in opposition to a motion for summary judgment. *See, e.g., Logiodice v. Trustees of Me. Cent. Inst.*, 170 F. Supp.2d 16, 30-31 n.12 (D. Me. 2001), *aff'd*, 296 F.3d 22 (1st Cir. 2002) ("In their opposition to the motions for

summary judgment, Plaintiffs argue for the first time that the MSAD 53 Defendants are also liable for their own failure to hold hearings for Zach after MCI suspended him. This theory of liability is not detectable in the Complaint, and Plaintiffs are not entitled to raise a new theory of liability for the first time in opposition to a motion for summary judgment."); *see also, e.g., Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1172 (1st Cir. 1995) ("At a bare minimum, even in this age of notice pleading, a defendant must be afforded both adequate notice of any claims asserted against him and a meaningful opportunity to mount a defense.").[38] Inasmuch as Boucher's failure-to-instruct theory cannot be discerned from the contours of his complaint, and he at no time moved to amend his complaint to add it, Continental is entitled to summary judgment with respect to the new theory of liability.[39]

I return to Boucher's theory of negligence as pleaded in his complaint: negligent manufacture. He identifies three reasons why this cause of action should survive summary judgment. *See* Plaintiff's S/J Opposition at 12-19. For the following reasons, none is persuasive:

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[38] Although Boucher did not move to file a surreply in response to Continental's reply, I have considered *sua sponte* whether language in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), calls this court's view, as expressed in *Logiodice*, into question. I conclude that it does not. In *Swierkiewicz*, the Supreme Court observed that the "simplified notice pleading standard" of Federal Rule of Civil Procedure 8(a)(2) "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 512. On the strength of this language, at least one federal district court has permitted a plaintiff to articulate new theories of liability for the first time in response to a motion for summary judgment. *See Rachel-Smith v. FTData, Inc.*, 247 F. Supp.2d 734, 744 n.4 (D. Md. 2003). Nonetheless, the Court in *Swierkiewicz* also observed that pursuant to Rule 8(a)(2) a complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 512. (citation and internal quotation marks omitted). In this spirit, the First Circuit reaffirmed, post-*Swierkiewicz*, its long-standing rule that "in any . . . action subject to notice pleading standards, the complaint should at least set forth minimal facts as to who did what to whom, when, where, and why – although why, when why means the actor's state of mind, can be averred generally. As we have said in a non-civil-rights context, the requirements of Rule 8(a)(2) are minimal – but minimal requirements are not tantamount to nonexistent requirements." *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 68 (1st Cir. 2004) (citation and internal quotation marks omitted).

[39] As Continental persuasively argues, *see* Defendant's S/J Reply at 6-7, even assuming *arguendo* that the new theory were cognizable, Boucher fails to adduce sufficient evidence to buttress it inasmuch as (i) this was not a simple consumer sale, (ii) Bond was a sophisticated user who had provided feedback that Continental used in its instructions or manufacture of its products, (iii) Bond was provided the buckets for use on a trial basis, and (iv) from all that appears, Bond did not discuss usage of this trial product with Boucher. As Continental notes, there is no evidence of the standard of care applicable to a paint manufacturer such as Continental in a situation such as this. *See id*.

1. That Continental's testing of QuikSand prior to its release reflected defects or desired changes in both QuikSand and PolySeal. *See id*. at 12-13. While Boucher does adduce evidence that Continental refined QuikSand's formulation, he offers no cognizable opinion testimony linking those refinements either to a product defect or to the particular problems of which he complains. For summary-judgment purposes, the court must draw all "reasonable inferences" in favor of the nonmoving party; however, "[a]n inference is reasonable only if it can be drawn from the evidence without resort to speculation." *Mulero-Rodríguez v. Ponte, Inc*., 98 F.3d 670, 672 (1st Cir. 1996) (citation and internal quotation marks omitted). In the absence of any additional evidence probative of a connection between the product refinements and negligent manufacture, a fact-finder would be speculating, rather than reasonably inferring, the existence of such a linkup.

2. That Continental encountered problems with its products on a log home in Dayton, Ohio. *See* Plaintiff's S/J Opposition at 13-14. As Boucher summarizes: "A number of theories were floated about by Continental personnel as to the cause of the staining, including reaction of the PolySeal with the 'NextGen' preservative in which the logs were dipped prior to delivery." *Id*. Even assuming *arguendo* that the PolySeal applied on the Dayton home did interact with a wood preservative, there is no evidence that the same preservative was applied to Boucher's home or that the interaction is indicative of negligent manufacture of the Continental product. Again, on this record, to so infer would be to speculate.

3. That Sherbondy's testimony is admissible pursuant to *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993). *See id*. at 14-19. To the extent that Boucher addresses the admissibility of Sherbondy's testimony as it stood prior to the filing of her affidavit, *see id*. at 14-15, his argument is irrelevant. Continental moved to exclude that testimony only for purposes of trial, *see* First Motion To

Exclude at 1; it assumed, for purposes of summary judgment, that it was admissible, *see* Defendant's S/J Motion at 2 n.1.

To the extent that Boucher argues that Sherbondy's earlier testimony suffices to stave off summary judgment on his negligence claim, *see* Plaintiff's S/J Opposition at 14-15, I disagree. In this case, expert testimony is required to establish both (i) the standard of care of a paint manufacturer and (ii) Continental's breach of that standard – matters that simply are beyond the ken of a lay jury. *See, e.g., Lemay*, 660 A.2d at 1117. While Sherbondy's earlier testimony, as summarized by Boucher, may have been "hardly . . . exculpatory of Continental[,]" Plaintiff's S/J Opposition at 15, it neither established the standard of care nor sufficed to permit a trier of fact to conclude that Continental breached any such standard.

Finally, to the extent that Boucher contends that Sherbondy's later testimony (via her affidavit) is admissible and establishes the requisite causation, *see* Plaintiff's S/J Opposition at 15-19, I have granted Continental's motion to exclude those later formed opinions.

Continental accordingly is entitled to summary judgment with respect to Count IV of the Complaint.

IV. Conclusion

For the foregoing reasons, I **GRANT** Continental's motion to strike the Sherbondy affidavit (its Second Motion To Exclude) and recommend that Continental's motion for summary judgment be **GRANTED** with respect to Boucher's claims against it. Adoption of this recommended decision would moot (i) Bond's and Continental's claims against each other and (ii) Continental's motion to prevent Sherbondy from testifying at trial (its First Motion To Exclude), thus ending this litigation. If this recommended decision is adopted, I further recommend that the plaintiff's visiting counsel be instructed to provide a copy of this opinion to his client and to certify to the court that he has done so.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 8th day of March, 2005.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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